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No. 51

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

THE FIRST NATIONAL BANK OF LOGAN, Logan, Utah, a National Banking Association.
Petitioner,

vs.

WALKER BANK & TRUST CO., a corporation,
Respondent.

October Term 1966
No. 51

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of the United States Supreme Court, Petitioner, The First National Bank of Logan, Utah, petitions for rehearing of the decision of the United States Supreme Court in the above entitled matter on December 12, 1966, on the question of the

District Court's jurisdiction to hear the case. Petitioner also respectfully suggests the Supreme Court may desire to further consider the second question on which the Writ of Certiorari was granted to the Tenth Circuit Court of Appeals.

STATEMENT OF THE CASE

In the District Court of Utah The First National Bank of Logan asked the Court to dismiss the action because the plaintiff, Walker Bank and Trust Company, had shown no present nor prospective damages by reason of the establishment and operation of The First National Bank's branch in Logan, Utah. The Court denied The First National Bank's motion (R. 36) and even though the same question was raised in the appeal to the Tenth Circuit Court of Appeals, the appellate Court also declined to rule on the question of jurisdiction (R. 57-58).

In its petition for writ of certiorari filed on January 4, 1966, The First National Bank of Logan asked the Supreme Court to consider two questions:

1. *Does a Federal District Court have jurisdiction to hear a complaint by a state bank that a National bank's intra-city branch was illegally established and asking that its continued operation be enjoined where there was no showing that the amount in controversy exceeded $10,000 as the state bank presented no evidence that there was or would be damage to the state bank's business by the continued operation of the National bank's branch, and the defendant National bank's pleading denied that the state bank would be damaged?*

2. *Whether Congress in the National Banking Act, 12 U. S. C. Section 36 (c) intended that National Banks are subject to the identical restrictions of state law as state banks in establishing a branch within the limits of their own community?*

The United States Supreme Court granted the requested writ of certiorari on May 2, 1966. However, it is respectfully submitted that unless the silence of the Court on question number one indicates an affirmative answer, neither question certified has been answered in the Supreme Court's opinion of December 12, 1966.

ARGUMENT

Point I

THE DISTRICT COURT OF UTAH DID NOT HAVE JURISDICTION TO HEAR WALKER BANK'S COMPLAINT.

The opinion of the Supreme Court is silent on the question of jurisdiction even though the answer to this question is vital to every National Bank in deciding whether there are any advantages in continuing under the National Banking system, if, as indicated in the Court's opinion of December 12, 1966, National banks must comply with both State and Federal requirements on banking.

In the District Court of Utah, Walker Bank, the plaintiff, offered no evidence that it was or will be damaged by the First National Bank's drive-in window. As explained in petitioner's brief (see pages 14 to 26) this state of facts requires the District Court to dismiss the

plaintiff's complaint under 28 U. S. C. Section 1331 because of at least two decisions of the Supreme Court. KVOS v. Associated Press (1936) 299 U. S. 269, 57 S. Ct. 197, 81 L. ed. 183, and McNutt v. General Motors Acceptance Corp. (1936) 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135, both held that the plaintiff must show damage in excess of the statutory amount ($10,000) before the Federal District Court has jurisdiction. In filing its complaint in the District Court the plaintiff, Walker Bank, relied on this section of the United States Code in order to obtain jurisdiction of the Federal District Court, but it was unable to show any damage as a result of the operation of The First National Bank's drive-in window nor was it able to show any prospective damage by the operation of such additional service to the customers of The First National Bank.

Does the silence of the Supreme Court on this question mean that the decisions in these two cases are no longer law? Does the silence of the Supreme Court mean that Federal District Courts can assume jurisdiction in any case involving the laws of the United States just by refusing to discuss the jurisdiction issue when raised by one of the parties? Apparently Court's have the power to disregard the question of jurisdiction because neither the Utah District Court in its opinion reported at 234 F. Supp. 74 (R. 37-46), nor the Tenth Circuit Court of Appeals in its opinion reported at 352 F. 2d 90 (R. 48-58), nor the United States Supreme Court opinion of December 12, 1966, mentions the question of jurisdiction.

If Federal Courts can ignore the question of jurisdiction, then it seems that citizens no longer have equal

rights under the law as a Court can choose which cases it will hear and which questions it does not want to consider just by mentioning or failing to mention the question of jurisdiction. And Congress has lost the power to prescribe limits for jurisdiction if a District Court can by remaining silent on the question, assume jurisdiction of a case involving less than $10,000 in damages if it wants to consider the case.

If any person can sue a National Bank in a Federal District Court without showing possible damage in the amount of $10,000, small country National banks may be burdened with defending actions in distant Federal Courts everytime they are involved in a transaction arising out of the National Bank Act. The expense of litigation alone may be sufficient reason to convert to a State bank.

If the silence of the Supreme Court in its December 12, 1966, opinion on the answer to the first question certified in this case indicates an affirmative answer to question number one, then without an opinion, the Supreme Court has repealed 28 U. S. C. Section 1348 giving District Courts jurisdiction by reason of the National Bank Act only in suits by the United States, or its officers, or by a National bank against the Comptroller of the Currency. Because if the District Courts have jurisdiction in any suit by any person involving a National Bank and the National Bank Act, without first showing that the jurisdictional amount of $10,000 is present, then there is no reason for 28 U. S. C. Section 1348.

We respectfully suggest that because the United States Supreme Court has always respected the will of

Congress with respect to jurisdiction and venue of Federal District Courts, that a rehearing should be granted on the question of jurisdiction in this case.

Point II

THE SUPREME COURT'S OPINION DOES NOT CLEARLY ANSWER THE QUESTION WHETHER NATIONAL BANKS ARE SUBJECT TO ALL RESTRICTIONS OF STATE LAW IN SEEKING TO ESTABLISH A BRANCH.

The provisions of subdivision (1) of 12 U. S. C. Section 36 (c) do not specifically incorporate any restriction of State law on branching except to state that state banks must be expressly authorized to branch in the city where the National bank is located before a National bank can branch. The question certified to the Supreme Court was whether this provision incorporates all restrictions of State law.

The opinion of the Supreme Court does not answer this question but states that the words used by Congress:

> " . . . if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; . . "

means that:

> " . . national branch banking is not only limited to those States the law of which permits it, but 'only to the extent that state laws permit branch banking'."

It is clear that the language of Congress does not specifically incorporate any particular type of restriction on branching within the community where the National bank is located. In branching outside the community Congress said that National banks are subject to restrictions of state law as to location and restrictions of state law as to capital. If National banks can branch outside of their community "only to the extent that state laws permit branch banking" then the two restrictions of State law specifically mentioned by Congress in subdivision (2) of the statute are redundant. It would seem the legislative process is sufficiently difficult without the legislators being required to carefully guard their use of language for fear such language even though not written into the final act will repeal language or will make redundant language actually written in the final act.

Congress specifically included two restrictions on branching within the community which applied regardless of state law. A restriction as to population and as to capital (see Petitioner's Brief p. 30). If the purpose of the National Branch Banking Act was to put National banks on an equal competitive basis with State banks (which purpose we think is clearly stated by the legislative history of the act) then by imposing additional restrictions on National banks Congress was specifically acting contrary to its legislative intent if it also intended National banks to be subject to *all* restrictions of State law in addition to the Federal requirements.

As is discussed on pages 39 and 40 of Petitioner's brief one of the primary concerns of Congress was to

prevent giant banks from taking the assets from the country to build up the large cities. One needs to only read the newspapers to appreciate the wisdom of Congress in trying to preserve the financial centers of small towns in order to avoid the present problems of overcrowded large cities. In order to protect National banks from being required to convert to State banks to protect their competitive position, Congress passed the McFadden Act which permitted National banks to branch in their own communities if State banks could branch there. As stated in petitioner's brief (p. 42-45) the cumulative effects of the statute will put National banks more nearly on a par with State banks.

It is not clear from the opinion of the Supreme Court whether this clear intent of Congress has now been superseded. Since no express restrictions of state law are incorporated in subdivision (1) of 12 U. S. C. Section 36 (c), it seems logical that either all restrictions of state law are incorporated or no restrictions of state law are incorporated other than state banks must have the right to branch in the community at the time the National bank seeks to branch. In reversing the Utah District Court the Tenth Circuit Court of Appeals rejected the District Court's reasoning that Congress intended only that State banks must be authorized to branch in that community before National banks can branch. In affirming the Tenth Circuit Court of Appeals it seems the Supreme Court is saying that National banks are not only subject to all regulations and restrictions of the Comptroller of the Currency, but they must also comply with State Bank Commissioner restrictions and regulations as well.

It is clear that if State banks are not expressly authorized to branch in Logan, Utah, unless they take over an existing bank, they are also not expressly authorized to branch in Logan, Utah, unless they obtain the approval of the State Bank Commissioner. For the Comptroller of the Currency cannot "pick and choose what portion of the law binds him."

The Supreme Court says that its decision assures competitive equality to State and National banks. This statement will be challeneged by any bank who has spent three months of preparing studies and forms in order to meet the very exacting requirements of the Comptroller of the Currency and has then subjected itself to a rigid three day examination by a National Bank examiner (R. 17) before it could obtain approval to establish a drive-in window to meet the competition of a state bank. To now say it must also comply with all the restrictions of the State Bank Commissioner is telling the National bank that it is far easier to convert to a State bank to obtain a drive-in window than it is to meet the requirements of both State and National Bank Administrators before such a window can be established.

On pages 42-45 of Petitioner's brief there is a comparison of whether the decision of the District Court or that of the Tenth Circuit Court of Appeals gives National banks competitive equality with state banks. We suggest that the Court carefully examine this comparison. We respectfully submit that Congress has determined that the strength of the Federal Reserve system lies in the compulsory requirement that National Banks remain a

member of that system. If the Court's opinion is going to cause National banks to revert to their position of the 1920's and decide that for their own economic self interest they must convert to State banks, we may be faced with the same problems the McFadden Act sought to avoid.

We respectfully request the Supreme Court to grant a rehearing not only on the question of jurisdiction which was not discussed, but also on the second question of restrictions of state law on National bank branching in order that the full impact on banking and the National economy may be discussed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Theodore S. Perry, counsel for Petitioner, The First National Bank of Logan, Utah, hereby certify that the foregoing petition for rehearing of the above entitled matter is presented in good faith and not for delay.

Theodore S. Perry
Attorney for Petitioner
The First National Bank of Logan, Utah